

**THERESA LIM CHIN CHIN & ORS. v.
INSPECTOR GENERAL OF POLICE**

[S.C. (Salleh Abas L.P., Lee Hun Hoe C.J. (Borneo) and Hashim Yeop A. Sani S.C.J.) December 22 and 23, 1987 and January 13, 1988]

[Kuala Lumpur – Criminal Appeal Nos. 86, 87 and 92 of 1987]

Constitutional Law – Application for habeas corpus – Arrest and detention under Internal Security Act – Preventive detention by police – Whether provisions relating to preventive detention by the police contrary to Constitution – Whether Internal Security Act limited to prevention of communist insurgency and subversion – Whether arrest and detention of person by police under Internal Security Act open to judicial examination – Subjective or objective test – Whether court can hold inquiry to determine lawfulness of arrest and detention – Whether rights under Article 5 of the Constitution available to detainee – Solitary confinement – Whether illegal – Internal Security Act 1960, ss 6 & 73 – Federal Constitution, Article 5.

In this case, the appellants had been arrested by the police pursuant to the police power of arrest under section 73 of the Internal Security Act. They were each kept in separate places and no counsel was allowed to see them. It was argued on behalf of the appellants that the arrest was illegal and therefore *habeas corpus* should be issued by the court for their release. The application was rejected in the High Court and the appellants appealed. The grounds put forward on the appeal were, *inter alia*, as follows:

(a) section 73 of the Internal Security Act is unconstitutional since it does not comply with the requirement of Article 151. Since the provisions regarding investigative preventive detention do not comply with the constitutional requirements of Article 151(1), namely, provision for informing a detainee of the grounds of his detention and allegations of facts constituting the grounds, section 73 is therefore void and as such the arrest and detention of the appellants are illegal;

(b) Article 149(1) limits the application of the Internal Security Act only to communist insurgency and subversion;

(c) the police power under section 73 of the Internal Security Act to arrest and detain a person pending enquiry is open to judicial examination, the test being an objective test;

(d) although the Internal Security Act may be held to be valid despite being contrary to the provision of fundamental liberties, there is nothing in section 73 of the Internal Security Act which is inconsistent with Article 5(2) of the Federal Constitution. Consequently, the provision of Article 5(2) must be read into section 73. The court must therefore hold an inquiry into the complaint of the appellants in order to determine the lawfulness of their arrest and detention;

(e) in addition to the right of inquiry by the court, the appellants have also a right to be informed of the grounds of their arrest and the right to consult and be defended by a legal practitioner of their choice. If these rights or any

A one of them are denied, the arrest and detention would be held to be illegal;

(f) as the appellants were each held in separate places, this would amount to solitary confinement and that being the case the detention ceases to be preventive and becomes punitive and consequently becomes illegal in the sense that it is not authorized by section 73 of the Internal Security Act.

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Held, dismissing the appeals: (1) in approaching the appeals, the court must be guided by the clear words of the Federal Constitution and the Internal Security Act. There can be no doubt that the Internal Security Act is a special law, however unpopular it may be, passed under the authority of Article 149 of the Federal Constitution;

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(2) the police power of arrest and detention under section 73 of the Internal Security Act could not be separated from the ministerial power to issue an order of detention. There is only one preventive detention and that is based on the order to be made by the Minister under section 8 of the Act. However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police are entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under section 8 of the Act;

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(3) the conditions or restrictions laid down in Article 151(1) of the Federal Constitution would come into play only after the Minister's order of preventive detention has been executed. At the initial stage, Article 151(1) has no application;

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(4) it is clear from the provisions of the Constitution and the Internal Security Act that the judges in the matter of preventive detention are the executive. This is supported by Article 151(3) which says that the Article does not impose an obligation on any authority to disclose facts, whose disclosure would in its opinion be against the national interest;

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(5) the Internal Security Act is valid and from the wording of the provision of the Act, there is nothing to show that it is restricted to communist activities;

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(6) in this case, whether the objective or subjective list is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and by the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as the subjective test;

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(7) in this case, there is insufficient evidence for the court to say that the fact (as agreed between the parties) that the detainees were kept in separate rooms amounted to solitary confinement and therefore punitive detention;

(8) as to when a detainee arrested under section 73 of the Internal Security Act should be allowed to exercise his right under Article 5(3) of the Constitution to consult a counsel of his choice, this should best be left to the good judgment of the authority as and when such right might not interfere with the police investigation. To show

breach of Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

Cases referred to:

- (1) *Teh Cheng Poh v. Public Prosecutor* [1979] 1 M.L.J. 50.
- (2) *Reg. v. Home Secretary, ex parte Hosenball* [1977] 1 W.L.R. 767, 787-788.
- (3) *Liversidge v. Anderson* [1942] A.C. 206.
- (4) *Reg. v. Inland Revenue Commissioners, ex parte Rossminster* [1980] A.C. 374.
- (5) *Nakkuda Ali v. Jayaratne* [1951] A.C. 66.
- (6) *Merdeka University Bhd. v. Government of Malaysia* [1982] 2 M.L.J. 243, 247.
- (7) *Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1988] 1 M.L.J. 182, 184.
- (8) *Chandler v. Director of Public Prosecutions* [1964] A.C. 763.
- (9) *Ooi Ah Phua v. Officer-in-charge Criminal Investigations* [1975] 2 M.L.J. 198.

SUPREME COURT.

G. Sri Ram (Cyrus Das, George Varghese and S. Rasiah with him) for the appellants in Criminal Appeals Nos. 86/87 and 92/87.

G.S. Nijar (Mohideen A. Kader, T. Rajamoorthy and Y.N. Ngeow with him) for the appellants in Criminal Appeal No. 87/87.

Tan Sri Abu Talib bin Othman, Attorney-General, Malaysia (*T. Selventhiranathan*, Senior Federal Counsel, with him) for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the judgment of the court): In these three appeals (Appeals No. 86, 87 and 92 of 1987), the appellants were arrested by three separate police officers at three different places on the same date, *i.e.* October 28, 1987, pursuant to the police power of arrest under section 73 of the ISA. At the outset of the appeals, it was agreed between counsel for the appellants and the Attorney-General that the appellants were each kept in separate places and no counsel were allowed to see them.

It is the contention of the appellants that their arrest was illegal and therefore *habeas corpus* should be issued by the court for their release. There are several grounds put forward on their behalf by the counsel, contending that their arrest and detention under section 73 of the ISA are illegal. The counsel's submissions are complementary to one another and were presented to the court in the following order.

A Encik Cyrus Das, who appeared for the appellants in Appeals No. 86 and 92 of 1987, maintained that section 73 of ISA is unconstitutional since it does not comply with the requirement of Article 151. The basis of his submission is that the ISA has made two types of preventive detentions: the first is the preventive detention by the police under section 73 and this is what he calls investigative preventive detention, and the second preventive detention pursuant to ministerial order under section 8. Since the provisions regarding investigative preventive detention do not comply with the constitutional requirements of Article 151(1), namely, provision for informing a detainee of the grounds of his detention and allegations of facts constituting the grounds, section 73 is therefore void and as such the arrest and detention of the appellants are illegal.

D The second part of Encik Cyrus Das's submission is that Article 149(1) limits the application of the ISA only to communist insurgency and subversion. He contended that any provision of the law passed under the authority of Article 149, which is designed to stop or prevent action which has been taken or threatened by a substantial body of persons, must be limited in its application to the prevention and stoppage of "that action" only and having regard to paragraph 174 of the Reid Commission Report (1956), and to the speeches made by the late Prime Minister Tun Abdul Razak in Parliament when moving the motion to pass this Act, "that action" must refer to communist insurgency and subversion.

G Encik Sri Ram, the second counsel for both the appellants in Appeals No. 86 and 92 of 1987, submitted to the court that the police power under section 73 to arrest and detain a person pending enquiry is open to judicial examination, the test, he submitted, being an objective test. He quoted a number of authorities from both local and foreign jurisdiction; and in particular the decisions of the High Court and the Federal Court in *Merdeka University* ([1981] 2 M.L.J. 356 and [1982] 2 M.L.J. 243 respectively) to show that where similar verbal formulae, namely, the authority "having reason to believe" or "having reasonable suspicion" or "being satisfied on the ground of national interest", and the like expressions are used, the opinion of the authority claiming to have such reason, suspicion or satisfaction must be open to judicial scrutiny. He also submitted that although the ISA may be held to be valid despite being contrary to the provisions of fundamental liberties, there is nothing in section 73 of the ISA

which is inconsistent with Article 5(2). Consequently, the provision of Article 5(2) must be read into section 73. This means that the court must hold an inquiry into the complaint of the appellants in order to determine the lawfulness of their arrest and detention.

Encik Nijar, counsel for the appellant in Appeal No. 87 of 1987, supported the submission of Encik Sri Ram on the applicability of Article 5 and argued that, in addition to right of an inquiry by the court, the appellants also have a right to be informed of the grounds of their arrest and the right to consult and to be defended by a legal practitioner of their choice. If these rights, or any one of them, are denied, the arrest and detention would be held to be illegal.

His final submission is that because the appellants were each held in separate places this would amount to a solitary confinement, and that being the case, the detention ceases to be preventive and becomes punitive and consequently becomes illegal in the sense that it is not authorized by section 73 and therefore *habeas corpus* should be issued.

In reply to these submissions, both the Attorney-General and the Senior Federal Counsel, Encik E. Selventhiranathan, submitted that none of the submissions could be accepted as a matter of law and also as a matter of fact relating to the present appeals.

Looking at the arguments of both sides, the appellants and the respondents, we found that the arguments tend to be pedantic, circuitous and at times inconsistent with earlier propositions that they are making. There can be no doubt that a great deal of research has gone into the making of these submissions and we must congratulate counsel for their industry and their efforts and tenacity in presenting the various contentions.

For ourselves, we must approach these appeals in the broad principles of the constitutional provisions and also the provisions of the ISA and in particular to those relating to preventive detention. We accept the approach to the legality and constitutionality of the ISA as so admirably and cogently stated by Lord Diplock in *Teh Cheng Poh v. Public Prosecutor*⁽¹⁾, and that is: we have to be guided by the clear words of the Constitution and the statute. We are not impressed by the argument that section 73 of the ISA is invalid because it does not comply with the mandatory provision of Article 151 clause (1) nor are we persuaded to

- A accept that the scope of the ISA, and in particular, preventive detention, should be limited to those involved in communist insurgency and subversion only. The broad and practical approach that we take in this matter is to see the scheme of the legislation both under the Constitution and the ISA.
- B There can be no doubt that the ISA is a special law, however unpopular it may be, passed under the authority of Article 149.

- C Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under section 73 could be separated from the ministerial power to issue an order of detention under section 8. We are of the opinion that there is only one preventive detention and that is based on the order to be made by the Minister under section 8. However, the Minister will not be in a position to make that order, unless information and evidence are brought before him, and, for this purpose, the police is entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under section 8. There can be no running away from the fact that the police power under section 73 is a step towards the ministerial power of issuing an order of detention under section 8, which the Attorney-General referred to as the initial stage in the process leading to preventive detention. In fact during the course of the argument, Encik Cyrus Das conceded this.
- D That being the case, the conditions or the restrictions laid down in Article 151 clause (1), in our view, would come into play only after the Minister's order of preventive detention has been executed. At the initial stage, Article 151 clause (1) has no application. After the order has been issued, the grounds of preventive detention together with allegations of fact must be given to a detainee and opportunity of making representations against the order must also be given. The representation will not be heard by a court of law, but by a specially constituted body known as the Advisory Board, consisting of a Chairman, who is a person qualified to be a judge of the High Court or Supreme Court, and two other members, appointed by the Yang Di-Pertuan Agong. It is clear from these provisions of the Constitution, and of the ISA, that the intention of the framers of the Constitution is that judges in the matter of preventive detentions relating to the security of the Federation are the executive. This is further supported by clause (3) of Article 151, which says that the Article does not impose an obligation on "any authority" — a term

much wider than "the authority on whose order any person is detained" — to disclose facts, whose disclosure would in its opinion be against the national interest. The authority here, in our view, includes those with powers dealing with preventive detention, not only the Minister and his staff but also the Board of Review and its staff and also the police who are involved in arresting and detaining a person pending the enquiry under section 73 of the Act. "Pending enquiries" under section 73 has not been given any statutory definition, but, it must, in our view, relate to police investigation with a view to reporting results of the enquiry to the Minister. This is clear from subsection (3) proviso (c) of section 73, where the Inspector-General of Police is required to report the circumstances of the arrest and detention to the Minister.

To show further that evidence or information relating to arrests and detentions, either at the initial stage, or in pursuant to a ministerial order, is excluded from public disclosure is section 16, which says that the Minister, or any member of an Advisory Board, or any public servant shall not be required to disclose facts or to produce documents which he considers to be against the national interest to disclose. Encik Sri Ram contended that this section is only confined to the provision of "this chapter", and since the chapter under which section 16 is enacted is preventive detention pursuant to a ministerial order under section 8, it therefore cannot apply to the arrest at the initial stage pursuant to police power under section 73. This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under section 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under section 8, but nevertheless, it is within one scheme of the preventive detention legislation.

The next argument is that in view of Article 149, the ISA should be limited to communist insurgencies alone. To support this proposition, we were invited to refer to paragraph 174 of the Reid Commission Report and to the speeches made by the late Prime Minister Tun Abdul Razak when moving the motion in Parliament to pass the Internal Security Bill. There had been some arguments as to whether or not it is proper for the court to

A advert to these documents. In our view, there is no hard and fast rule about this, and certainly the courts in this country, as well as the United Kingdom, admit such references but it is clear from the practice of the court that such reference is only to appreciate the legislative history of an Act, and it cannot be regarded as the basis or the determining factor for interpreting the Act or any provision of the Act. If we do that, the court will cease to be the ultimate interpreters of law because in the end what is law will be guided by what the politicians said in Parliament and indeed this has been asserted recently. For this purpose, we would like to refer to a statement by Cumming-Bruce L.J. in *R. v. Hosenball*⁽²⁾ at pp. 787-788:

"There are two other grounds relied upon by the appellant. One is founded upon a statement made by the Secretary of State for Home Affairs on the floor of the House of Commons to which we have been referred. It was suggested, as I understand it, that such rights as Mr. Hosenball might have having regard to the scrutiny of the Act might be enlarged by the statement of the Secretary of State in the House of Commons. I cannot accept as a matter of constitutional law and principle that where the rights of the subject or of a resident have been dealt with in an Act of Parliament a statement made by a minister in Parliament can have the effect of enlarging those statutory rights. The danger of assenting to such a doctrine is obvious. If a minister can enlarge the rights of a subject as laid down in an Act of Parliament by a statement on the floor of the House, it is but a short step to say that it is constitutional for a minister to restrict the rights of a subject by making a statement on the floor of the House. By our constitution, it is Acts of Parliament and not the acts of ministers, save when authorized by Act of Parliament or under the prerogative, that define the rights of subjects or of residents."

The expression "that action" in our review has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provision of the Act there is nothing to show that it is restricted to communist activities.

We now refer to the objective test submitted by Encik Sri Ram. The submission is based on the dissenting speech of Lord Atkin in *Liversidge v. Anderson*,⁽³⁾ speeches by Lord Diplock and Lord Scarman in *R. v. Inland Revenue Commissioners, ex parte Rossminster*⁽⁴⁾ calling for adoption of Lord Atkin's dissenting speech and abandonment of the speeches of the majority of the Law Lords, the Privy Council decision in *Nakkuda Ali v. Jayaratne*⁽⁵⁾, *Merdeka University v. Government of Malaysia*⁽⁶⁾ and some other decisions both from England and other Commonwealth countries. Needless to say here that our broad approach is that the ISA is a peculiar law, and it is peculiar to our country. And it is on the basis of the provisions of this Act that we have to decide whether in

the opinion of the arresting police officer that he has reason to believe is open to judicial examination. This submission was earlier submitted to this court in *Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun*⁽⁷⁾ by Encik Sri Ram, and we have rejected that submission although we upheld the release of the detainee in that case because the arresting police officer had sworn an affidavit to the effect that the arrest and detention related to allegations of bank fraud which is a criminal offence. However, we would like to say that the Privy Council decision in *Nakkuda Ali's* case⁽⁵⁾ did not relate to matters relating to national security. It was only relating to the right of being heard to be given to a textile licensee before his licence could be cancelled.

Our court's decisions in *Merdeka University*⁽⁶⁾ relates to the satisfaction of the Yang Di-Pertuan Agong in regard to the establishment of an institution of higher learning on the basis of national interest, and, in dealing with that case, the court was able to proceed to review the matter because a great deal of evidence was presented by no less a person than the Deputy Prime Minister himself who gave extensive evidence in court. Thus, whatever these decisions have decided and developments of the law elsewhere, especially in England, relating to the fairness of the process of executive decision-making, in the context of our case we are constrained by the following two propositions.

First, we agree with the opinion of the Chief Justice that national interest is wider than national security and in fact, in our view, national interest is the same as public interest, but national security is a very different kind of interest altogether. This is clearly recognized by the House of Lords in *Chandler v. D.P.P.*⁽⁸⁾ at p. 790:

"The question more frequently arises as to what is and what is not in the public interest. I do not subscribe to the view that the government or a minister must always or even as a general rule use the last word about that but here we are dealing with a very special matter — interfering with the prohibited place which Whetherfield was."

Secondly, section 16 of the ISA and Article 151 clause (3) clearly authorize the executive not to disclose any information relating to national security. In that event, the court could only be limited to what has been presented before it. The police officers who arrested the detainees have sworn affidavits to say that they have information which made them come to the opinion that they have reason to believe that there were grounds for detaining the appellants under section 8 of the Act,

A and that they are not prepared to disclose this information. Is the court then to declare that the arrest and detention are illegal for no other reason that these officers are not prepared to disclose the information? If there has been no provision of clause (3) of Article 151 and section 16, the matter, of course, could be decided by the court, whether it was really in the interest of the security that such information could be withheld. Thus, in our view no inference of illegality could be imposed on the arrest in the circumstances. It is therefore up to the appellants to show that the arrest and detention are illegal. In other words, even if the test under section 73 is objective, nothing much can be done, in view of the lack of evidence and it is in this context that the court expressed the view that the test is subjective. The expression "subjective and objective tests" is merely a label to show the results of the court's attitude as to whether or not it will or it will not exercise its jurisdiction. It is descriptive of the result of the court's decision elicited from factual situations reflecting judicial attitude rather than a starting point or a legal element from which legal result could be arrived at. In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as a subjective test.

Next, we must turn to the submission of Encik Nijar.

On the allegation by Encik Nijar that the detainees were kept in solitary confinement, there is simply insufficient evidence for us to say that the fact (as agreed between the parties) that the detainees were kept in separate rooms amounted to solitary confinement and therefore punitive detention.

When should a detainee arrested under section 73 of the Internal Security Act be allowed to exercise his right under Article 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigations, Kedah/Perlis*⁽⁹⁾. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of

Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

In the circumstance of the case, having regard to the grounds we have set out earlier, the appeals should be dismissed. But we are not unmindful of our grave responsibility to be between the executive and citizens. We would like to reiterate that we do not abdicate our function and shy away from our responsibilities. It would be very much to be regretted and indeed it would be most unfortunate if the results of these appeals were to be understood as an abdication of our duties. This misunderstanding may arise in view of so many recent adverse comments against the judiciary and the legal system of this country. The court must be neutral and independent. When the law is clear, we must declare what the law is.

In a proceeding like the present one where both the legislation and the executive act under it are challenged, our duties are not to substitute our decision for that of the executive. We are only concerned with the procedural aspects of the exercise of executive discretion. We have no interest, nor desire, to embark upon trespassing into the domains of the legislature or the executive. In a democratic society in which the government is not absolute but a limited one, there is a duty on the part of the executive to act with fairness and follow a fair procedure. Since in these appeals, the law is clear, despite the fact that it is much criticized both at home and abroad, our decision cannot be otherwise than what we have said earlier. We made this observation because we feel that we owe a duty to the public to put our position on record in view of so many adverse comments made against us.

The appeals are therefore dismissed.

Appeals dismissed.

Solicitors: Zain & Co., Ngeow & Maurice Gomes.

EASOW PLANTATIONS SDN. BHD. v. MOSBERT BERHAD (IN LIQUIDATION)

RANJIT SINGH v. JET AGE CONSTRUCTION SDN. BHD.

[S.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) & Lee Hun Hoe C.J. (Borneo)) December 9 & 30, 1987]

[Kuala Lumpur — Supreme Court Civil Appeals
Nos. 40 and 111 of 1987]

Land Law — Caveat — Caveat limited to area of land claimed — Sale of subdivided lots to various purchasers — Subsequent sale of whole land — Caveat by individual purchasers — National Land Code, s. 323(2).

In this case, Mosbert Berhad, the registered owner of a large piece of land in Johore Bahru, had subdivided the land into lots and sold the subdivided lots to various purchasers. After paying for these sublots, the purchasers entered caveats in order to protect their interest in the land. Mosbert Berhad went into liquidation and the liquidator sold the land to a company called Jet Age. In order to enable the land to be registered in their name, Jet Age applied to the High Court to have the caveats removed.

In Civil Appeal No. 40 of 1987, the appellant claimed that it had bought the sublots from another company, Module Construction, but did not say in its application how the other company obtained its interest in the land. The caveat was limited only to the area of the sublots which it claimed. The learned judge of the High Court allowed the application to remove the caveat. The appellant appealed.

In Civil Appeal No. 111 of 1987, the appellant had entered a caveat in respect of the subplot purchased from Mosbert Berhad. The learned judge of the High Court allowed the application for the removal of the caveat. The appellant appealed.

Held: (1) in Civil Appeal No. 40 of 1987, although the caveat was limited to the area of the sublots claimed, the application did not show any connection between Module Construction and the purchaser or Mosbert Berhad. Since the land is vested in Mosbert Berhad, there was a missing link and the order of the learned judge was unassailable. The appeal is therefore dismissed;

(2) in Civil Appeal No. 111 of 1987, the appellant in his application mentioned that he purchased the subplot from Mosbert Berhad and that the caveat was only limited to the area relating to the subplot. The appellant had therefore complied with the law and the caveat should stay. The appeal is therefore allowed.

Cases referred to:

- (1) *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 M.L.J. 446.
- (2) *N. Vangedaselam v. Mahavevan & Anor.* [1976] 2 M.L.J. 161, 162.

SUPREME COURT.

D.P. Naban for the appellant in Civil Appeal No. 40/87.